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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *WY*

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BASIMA BAHOO,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security

Defendants.

CASE NO. 15cv523 WQH
(KSC)

ORDER

HAYES, Judge:

The matter before the Court is the Report and Recommendation (ECF No. 18) issued by United States Magistrate Judge Karen S. Crawford, recommending that the motion for summary judgment (ECF No. 13) filed by Plaintiff be denied and that the cross-motion for summary judgment (ECF No. 14) filed by Defendant be granted.

I. BACKGROUND

On January 18, 2012, Plaintiff filed an application for Social Security Income Benefits ("SSI"), alleging disability beginning on August 1, 2011. (ECF No. 10-5 at 2-11). On February 3, 2012, Plaintiff's application was denied. (ECF No. 10-4 at 2). On April 24, 2012, Plaintiff's request for SSI was denied on reconsideration. *Id.* at 10.

On June 25, 2012, Plaintiff requested an administrative hearing before an Administrative Law Judge ("ALJ"). *Id.* at 15. A hearing was held on August 12, 2013. (ECF No. 10-2 at 47-56). Plaintiff testified at the hearing, as did Molly Catzil, a

1 vocational expert. *Id.* at 55-57. On August 30, 2013, the ALJ found that:

2 1. The claimant has not engaged in substantial gainful activity since
3 January 9, 2012.

4 2. The claimant has the “severe” impairments of left knee conditions and
5 obesity, but does not have an impairment or a combination of impairments
6 that meets or equals in severity an impairment listed at Appendix 1 to
7 Subpart P of Regulations no. 4.

8 3. The claimant’s allegations and those made on his behalf are credible
9 only to the extent they are consistent with Finding no. 4 below.

10 4. The claimant has the residual functional capacity for a [sic] sedentary
11 work, and must use a cane for prolonged ambulation.

12 5. The claimant has no past relevant work.

13 6. Considering her medical/vocational profile, the claimant is “not
14 disabled” under the framework of Rule 201.18 and/or 201.21/201.22.
15 Although the claimant cannot perform the full range of unskilled light
16 work (due to lingual limitations), jobs exist in significant number in the
17 national economy she can perform, including those specially identified by
18 the vocational expert (eye dropper, lens inserter, and sack repairer).

19 7. The claimant has not been under a “disability” within the meaning of
20 the Social Security Act at any time through the date of this decision.

21 (ECF No. 10-2 at 29-30).

22 On September 9, 2013, Plaintiff submitted a request for review of the ALJ’s
23 decision with the Appeals Council. (ECF No. 10-2 at 17-22). The Appeals Council
24 then denied Plaintiff’s request for review, and the ALJ’s decision became the final
25 decision of the Commissioner of Social Security (“Commissioner”). *Id.* at 4-6.

26 On March 6, 2015, Plaintiff commenced this action for judicial review of the
27 Commissioner’s final decision pursuant to 42 U.S.C. § 405(g). (ECF No. 1).

28 On August 31, 2015, Plaintiff filed a Motion for Summary Judgment. (ECF No.
13). On October 2, 2015, Defendant filed a Cross-Motion for Summary Judgment,
(ECF No. 14), and an Opposition to Plaintiff’s Motion for Summary Judgment. (ECF
No. 15). On October 15, 2015, Plaintiff filed a Reply in support of her Motion for
Summary Judgment. (ECF No. 17).

On June 6, 2016, the Magistrate Judge issued a Report and Recommendation.
(ECF No. 18). The Magistrate Judge stated in part,

1 Substantial evidence in the Administrative Record supports the ALJ's
 2 conclusion that plaintiff has limited proficiency but is not illiterate or
 3 unable to communicate in English. Substantial evidence further supports
 4 the ALJ's conclusion that plaintiff is not disabled under the Vocational
 Guidelines, even though her English language skills are limited, because
 she retains the residual functional capacity to do sedentary work that is
 available in significant numbers in the regional and national economies.

5 *Id.* at 27. The Magistrate Judge recommended that Plaintiff's Motion for Summary
 6 Judgment be denied and Defendant's Cross-Motion for Summary Judgment be granted.

7 On June 20, 2016, Plaintiff filed objections to the Report and Recommendation.
 8 (ECF No. 19). Plaintiff objects to the Magistrate Judge's conclusions that the ALJ did
 9 not err in finding that Plaintiff is not illiterate or unable to communicate in English, and
 10 that Plaintiff's testimony is not credible. *Id.* at 3. Plaintiff contends that this Court
 11 should credit Bahoo's testimony as true and reverse and award benefits to Bahoo or,
 12 in the alternative, remand this matter for further administrative proceedings. *Id.* at 10-
 13 11.

14 **II. STANDARDS OF REVIEW**

15 **A. District Court Review of a Report and Recommendation**

16 The duties of the district court in connection with a report and recommendation
 17 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28
 18 U.S.C. § 636(b). The district court must "make a de novo determination of those
 19 portions of the report . . . to which objection is made," and "may accept, reject, or
 20 modify, in whole or in part, the findings or recommendations made by the magistrate."
 21 28 U.S.C. § 636(b). The district court need not review de novo those portions of a
 22 report and recommendation to which neither party objects. *See Wang v. Masaitis*, 416
 23 F.3d 992, 1000 n.13 (9th Cir. 2005); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th
 24 Cir. 2003) (en banc).

25 **B. Review of Denial of a Disability Claim**

26 When an applicant's claim for disability benefits under the Social Security Act
 27 has been denied, she may seek judicial review of the Commissioner's decision. *See* 42
 28 U.S.C. § 405(g). Where, as in this case, "the Appeals Council denies a request for

review of an ALJ's decision, the decision of the ALJ represents the final decision of the Commissioner." *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 n.1 (9th Cir. 2004) (citing 20 C.F.R. § 404.981). A reviewing court will reverse the ALJ's decision only if "it is based upon legal error or is not supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and is "more than a mere scintilla but less than a preponderance." *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (citation omitted). "If the record would support more than one rational interpretation, we defer to the ALJ's decision." *Bayliss*, 427 F.3d at 1214 n.1 (citation omitted).

III. ANALYSIS

Plaintiff does not dispute the ALJ's residual functional capacity assessment concluding that she is restricted to sedentary work but argues that she should be considered "disabled" under the Vocational Guidelines because she is (1) illiterate and/or unable to communicate in English and (2) unskilled or has no past relevant work history. Additionally, Plaintiff contends that her testimony regarding her medical condition should be found credible.

A. Determination of Plaintiff's English Language Ability

In the written opinion dated August 30, 2013, the ALJ stated,

SSA did not categorize the claimant as illiterate or unable to communicate in English (Ex 2A). This conclusion is buttressed by the factors . . . including conflicting statements regarding her lingual abilities, her being certified for and working in this country, presentations to medical sources, and the ALJ's ultimate assessment of credibility. . . . The ALJ finds she is not illiterate in or unable to communicate in English.

SSA utilized Rule 201.18 at Appendix 2 as its framework for decision-making, which calls for a finding of "not disabled" (Ex 2A). This Rule applies to an individual with no or unskilled work who is literate and able to communicate in English, but has a "limited or less" education. Since this claimant has an advanced education, no Rule directly applies (given her skilled work history, albeit distant, she may more closely approximate Rule 201.21 or 201.22) In any event, the only sedentary work that calls for a finding of "disabled" for an individual ages 45-49 is 201.17, describing an individual who is illiterate or unable to communicate in English and has no or unskilled work. This does not apply to the claimant.

1 Assuming arguendo that the ALJ classified the claimant as illiterate or
 2 unable to communicate in English, she would still shy from Rule 201.17.
 3 This contemplates an individual with only adverse vocational factors and
 4 not the type of history and experience this claimant possesses. Although
 5 the claimant reportedly last performed nursing work in Iraq slightly more
 6 than 15 years ago, she obviously has skills that place her in better stead
 7 than an individual who has never worked or has only done unskilled
 8 work. Additionally, the claimant has recent education and employment in
 9 this country (at least semi-skilled) that, though arguably not relevant
 10 work, clearly places her in better position to work than an individual with
 11 no or unskilled work. The claimant did in fact work in this country, failing
 12 in this greater than sedentary job only because of her knee problems.
 13 Given these circumstances, the ALJ would utilize Rules 201.21 or 201.22,
 14 not Rule 201.17.

15 (ECF No. 10-2 at 28-29).

16 In the Report and Recommendation, the Magistrate Judge concluded that
 17 “[s]ubstantial evidence in the Administrative Record supports the ALJ’s conclusion
 18 that plaintiff has limited proficiency but is not illiterate or unable to communicate in
 19 English.” (ECF No. 18 at 27). The Magistrate Judge explained,

20 First, the record includes the Disability Report- Field Office, which was
 21 completed on January 18, 2012 as a result of a face-to-face interview
 22 between plaintiff and an interviewer identified as “H. Aguirre.” [Doc. No.
 23 10-6, at p. 3-4]. In the Observations section of the Disability Report, the
 24 interviewer indicated plaintiff was coherent and did not have difficulty
 25 hearing, reading, breathing, understanding, concentrating, talking,
 26 answering, seeing, using her hands, or writing. [Doc. No. 10-6, at p. 3.]

27 In pertinent part, the form in the record entitled Disability Report - Adult
 28 includes the following questions and responses:

1. G Can you speak and understand English? Yes.
 If “No”, what language do you prefer? [No response.]
 If you cannot speak and understand English, we will provide
 an interpreter, free of charge.
1. H Can you read and understand English? No
2. F Who is completing this report? The person who is applying
 for disability.

[Doc. No. 10-6, at p.5.]

23 Next, the record also includes a Work History Report form that was
 24 completed by hand and signed on January 28, 2012. [Doc. No. 10-6, at pp.
 25 2-17.] The responses are written in simple English using the first person,
 26 indicating plaintiff filled the form out herself and has a basic ability to
 27 read, write, and follow simple instructions in English. For example, the
 28 form states: “List all of the jobs that you had in the 15 years before you
 became unable to work because of your illnesses, injuries, or conditions.”
 [Doc. No. 10-6, at p. 14.] The handwritten responses states that plaintiff
 worked in a hospital as a nurse from 1982 to 1995 and worked at home
 taking care of children in 2011. Referring to the job in child care, the
 response goes on to state in part as follows: “I stop working I cant too
 much pain in all my body. Im very happy with this job I dont have kids

1 put[sic] Im very sick I cant do anything when have cancer all time. . .”
 2 [Doc. No. 10-6, at p. 14]

3 At the hearing before the ALJ, the record shows plaintiff was assisted by
 4 an interpreter. [Doc. No. 10-2, at p. 25] . . . As outlined above, there are
 5 a number of notations in medical notes made by plaintiff’s doctors
 6 indicating she communicated with them through an interpreter during
 7 medical appointments. On the other hand, there are a number of medical
 8 notes that do not include any such notations. Although two of plaintiff’s
 9 doctors wrote letters about plaintiff’s “lingual abilities” in connection
 10 with her claim for disability benefits, they are not very helpful. Dr. Eve’s
 11 letters says plaintiff has “poor English.” [Doc. No. 10-7, at p. 180.] It does
 12 not indicate plaintiff cannot communicate at all in English. Likewise, Dr.
 13 Held’s letter only states that plaintiff “*appears* unable to speak or read
 14 English.” [Doc. No. 10-7, at p. 181 (emphasis added).] . . .

15 *Id.* at 21-23.

16 Addressing Plaintiff’s arguments in support of her Motion for Summary
 17 Judgment, the Magistrate Judge explained,

18 Plaintiff’s arguments are unconvincing, because they are unsupported
 19 and/or contradicted by the record. There is only one form from the initial
 20 application process that includes a notation indicating it was completed
 21 by someone other than plaintiff. This is the Disability Report - Field
 22 Office, which was completed by a face-to-face interviewer on or about
 23 January 18, 2012, at the time plaintiff was completing the initial
 24 paperwork for her application. [Doc. No. 10-6, at p. 3.] As noted above,
 25 the interviewer indicated plaintiff did not have any difficulty hearing,
 26 reading, understanding, talking, answering, or writing. [Doc. No. 10-6, at
 27 p. 3.] Although the form includes space for observations and other
 28 comments, the interviewer did not in any way indicate there was any
 language barrier during the interview. [Doc. No. 10-6, at p.3] There is no
 other evidence in the record to prove with any degree of certainty that
 plaintiff was unable to complete the forms on her own or that someone
 else completed the forms for her because she was unable to do so. Nor
 would it be appropriate for the Court to consider evidence on this issue
 that is outside the administrative record. 42 U.S.C. § 405(g); *Baker v.*
Barnhart, 457 F.3d 882, 891 (8th Cir. 2006).

In sum, there was conflicting evidence in the record regarding plaintiff’s
 ability to understand, speak, read, and write in English. However, it was
 the ALJ’s duty to resolve any conflicts in the evidence and to make
 determinations about credibility. *Connett v. Barnhart*, 340 F.3d 871, 873
 (9th Cir. 2003); *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
 2001). The ALJ’s decision indicates that she considered all relevant and
 probative evidence and appropriately resolved the conflict. For the
 reasons outlined more fully above, it is further apparent that the ALJ had
 reason to doubt plaintiff’s credibility. The evidence in the record is
 consistent with a finding that plaintiff has basic literacy and
 communication skills in English, but she prefers to use a translator when
 she must communicate and understand at a more advanced level, such as
 when she is speaking with a physician or participating in the hearing with
 the ALJ. In other words, the record includes substantial evidence from
 which the ALJ could reasonably infer that plaintiff’s English language

1 abilities were limited but not as much as plaintiff claimed in her
2 testimony.

3 *Id.* at 26-27.

4 Plaintiff objects to the Magistrate Judge's conclusion that the ALJ did not err in
5 finding that Plaintiff is not illiterate in or unable to communicate in English. (ECF No.
6 19 at 3). Specifically, Plaintiff objects to the Magistrate Judge's reliance on several
7 documents, including the Disability Report titled, Form SSA - 336-7 and the Disability
8 Report titled Form SSA - 3368, as evidence that Plaintiff is not illiterate and unable to
9 communicate in English because those documents are inconclusive. Plaintiff objects
10 to the Magistrate Judge's use of the Work History Report as evidence because it is not
11 clear that Bahoo filled out the form herself.

12 Plaintiff objects to the Magistrate Judge's use of the medical records that do not
13 include notations indicating Plaintiff's inability to communicate in the English
14 language because medical records should not be used as conclusive evidence for
15 disability determinations. Plaintiff further contends that Plaintiff's education from
16 another country and the fact that she took courses to become a certified babysitter and
17 work at a daycare should not be indicative of her ability to communicate in English
18 because a foreign education is generally not indicative of the ability to communicate
19 in English and "there is nothing inherent in the taking of courses; attaining a babysitter
20 license; and babysitting children that necessarily required the ability to communicate
21 or read/write in the English language." *Id.* at 7.

22 This Court has reviewed all of the records and the Report and Recommendation
23 and concludes that the evidence supports the ALJ's finding that Plaintiff is not illiterate
24 in or unable to communicate in English. The Disability Report titled, Form SSA - 336-
25 7, which was completed as a result of a face-to-face interview between plaintiff and an
26 interviewer, indicated that Plaintiff did not have trouble reading, understanding,
27 talking, and answering in English. In the Disability Report titled, Form SSA - 3368,
28 the Plaintiff indicated that she can speak and understand English. The Work History
Report was completed by hand and signed by Plaintiff provides evidence that Plaintiff

1 has communication skills in English. In that Report, the responses were written in
 2 simple English using the first person which supports the conclusion that Plaintiff filled
 3 out the form herself and has the ability to read, write, and understand basic English.
 4 Plaintiff's prior experience as a certified babysitter and her work at a daycare also
 5 supports the ALJ's conclusion that Plaintiff has some communication skills in English.
 6 The ALJ did not commit legal error when she considered the fact that Plaintiff took
 7 courses to become a certified babysitter. SSA regulations require the ALJ to consider
 8 information about the claimant's "formal or informal education [she] may have through
 9 [her] previous work, community projects, hobbies, and any other activities which might
 10 help [her] work." 20 C.F.R. § 416.964(b)(6).

11 Given the two Disability Reports, the Work History Report, the notations in the
 12 medical records, Plaintiff's prior foreign education, and Plaintiff's prior work
 13 experience, the Magistrate Judge correctly concluded that the ALJ's finding that
 14 Plaintiff is not illiterate in or unable to communicate in English was supported by
 15 sufficient evidence.¹

16 **B. Credibility Determination**

17 Plaintiff objects to the Magistrate Judge's conclusion that the ALJ did not err in
 18 finding that Plaintiff's testimony regarding her medical condition is not credible.
 19 Plaintiff contends that "the alleged lack of support from the medical evidence cannot
 20 be the sole basis for rejection of a claimant's testimony." (ECF No. 19 at 10). Plaintiff
 21 contends that the "ALJ failed to articulate clear and convincing reasons for rejecting
 22 Basima Bahoo's testimony." *Id.*

23 Congress expressly prohibits granting disability benefits based solely on
 24 subjective complaints. 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. § 404.1529(a) (explaining
 25 that "statements about your pain or other symptoms will not alone establish that you
 26

27 ¹The Court does not reach the argument regarding Plaintiff's skills or past work
 28 history because Section 201.17 does not apply to Plaintiff. Section 201.17 is
 inapplicable because the ALJ did not err in finding that Plaintiff is not illiterate in or
 unable to communicate in English.


are disabled. . .”). The ALJ is also prohibited from rejecting or discrediting claims of excess pain testimony based solely on the lack of objective medical support in the record. *See Light v. Social Security Administration*, 119 F.3d 789,792 (9th Cir. 1997). In this case, Plaintiff’s testimony about increased and excessive pain was in conflict with medical records that describe “mild improvement.” (ECF No. 18 at 18). Plaintiff’s records do not indicate any signs of worsening conditions nor any signs to collaborate Plaintiff’s testimony that she could not “lift and carry more than one pound.” *Id.* at 19. Plaintiff’s testimony concerning her worsening conditions conflicts with medical records, which state that the Plaintiff “did well post-surgically,” is “overall doing well,” and has “decreased use of narcotics.” *Id.* Based on the record, the Court concludes that the Magistrate Judge correctly concluded that the ALJ met her burden of providing clear and convincing reasons of rejecting Plaintiff’s testimony based on credibility.

IV. CONCLUSION

After a de novo review of those portions of the Report and Recommendation to which Plaintiff objected, and after a review of the ALJ’s decision and the Administrative Record, the Court finds that the Magistrate Judge correctly evaluated the facts and correctly applied the controlling law in this case. The Court concludes that the ALJ’s decision is supported by substantial evidence and is free of legal error.

IT IS HEREBY ORDERED that (1) the Report and Recommendation (ECF No. 18) is ADOPTED in its entirety; (2) Plaintiff’s Motion for Summary Judgment (ECF No. 13) is DENIED; and (3) Defendant’s Cross-Motion for Summary Judgment (ECF No. 14) is GRANTED. The Clerk of the Court shall enter judgment for Defendant and against Plaintiff.

Dated: 8/14/16


WILLIAM Q. HAYES
 United States District Judge